THE EXPANSION OF THE COMMON LAW.

II. The Scales of Justice.

Under the rude and inadequate forms of the ancient popular courts we have been able to discern principles of lasting value, which are still at the very foundation of our judicial system and of our public law, and of which little is said on any common occasion, just because we accept them as matters of course. Now the popular courts were wholly incompetent to adapt themselves to a new state of society, and therefore, to maintain themselves and their traditions either for better or worse. Their constitution was essentially provincial, archaic and unprogressive. No system of national justice could ever come out of them; nor is there anything that strikes a student of our legal history more forcibly than the swiftness of their decline, after the thirteenth century, into insignificance and all but total oblivion.[1] They were supplanted, as is notorious, for greater matters by the king's courts or the palatine courts which had unlimited legal franchises, and for smaller matters partly by the courts of private jurisdictions, enjoying immunities and exercising powers of every lower degree, and partly by the privileged jurisdictions of cities and boroughs. For the present purpose it is needless to dwell on the complicated, sometimes anomalous, and always interesting distinctions which are to be observed among these various authorities. Whatever might be their particular historical origin and legal warrant, the local courts agreed, in fact, with very few exceptions of any importance, in imitating the king's courts. The procedure and methods of the king's judges became the general model. So far did the Bishop of Durham carry the logic of his regalities that he found no difficulty in issuing, as temporal lord, prohibitions addressed to himself as bishop. It may be taken as a

[1] Their judicial functions appear to have been a vanishing quantity in the Elizabethan age. From an early time the king and his judges were teaching the sheriff and the county court to know their place. I quite agree with Mr. G. B. Adams (Amer. Hist. Rev. viii. 487) that Henry I's writ (Liebermann, *Quadrip.* p. 165) was not enabling but restrictive.

safe rule, throughout the formative period of the common law, that what the superior courts are doing to-day will be done by the inferior courts on some morrow not far off. Royal justice is the predominant and directing justice. The question now before us is how it became truly national, and preserved the substantial good points of ancient Germanic polity, while it discarded the obsolete forms.

Unless we fall back on the older mechanical theories which ignored the actions and reactions of human societies, and regarded institutions as plastic material in the hand of the lawgiver, the question is not at first sight easy. Not that the mechanical method would give us a plausible solution even on its own ground. Men called Edward I the English Justinian; the comparision is at best superficial. A Justinian having no classical treatises of Papinian and Ulpian to make his Digest withal, no Gaius to revise for his Institutes, no golden age of the Antonines, no tradition of Labeo, no Twelve Tables, not so much as a Theodosian Code,[1] must be a strange thing for a civilian to imagine. But not even their aims were similar. Justinian consolidated and stereotyped the work of greater generations, whose development was already, for the time being, arrested. He worked in no prophetic spirit, but dreamed of finality. His service to the world was to provide a body in which the soul of Roman law, weary but not dead, might sleep until the appointed time for awaking. Very different was the soul for which Edward I and his counselors had to furnish an earthly tabernacle; a soul young and puissant, ardent with the fire and not yet freed from the rudeness of new life, setting forth on a mission of which she was all unconscious, whose extent no means of knowledge could then comprehend and whose course no human wisdom could descry. And yet this much was clear to our founders of the thirteenth century, to William Raleigh and to Henry of Bratton no less than to Montfort, that they were giving the best of their lives to no common work.

[1] I need hardly remind the learned reader that in the second half of the thirteenth century the text of the Anglo-Saxon dooms was as obsolete as it is now, and less understood. The vagaries of that puzzling work the Mirror of Justices, coupled with its failure to produce any effect, only confirm this.

But the very fact that the making of the custom of the realm was no common task, nor to be accomplished with common instruments, involved a grave danger, or so it seems to us looking back. The power that the king used was nothing arbitrary or new. It was, in principle, accepted from of old. But it was not ordinary judicial power; it was an extraordinary resource for extraordinary need, almost what we should now call an emergency power. A man might betake himself to the king if he failed to find justice in the popular courts, but only on that condition. So we learn from the Anglo-Saxon dooms. Let it be well observed that the failure must be total. It was not enough that the suitor was dissatisfied with a decision which had been given. He had no standing before the king unless he had tried in vain to get any decision at all, or the jurisdiction was usurped, or the judgment of the court was openly set at naught. The king had no jurisdiction to reverse the dooms of the county or the hundred on appeal. Archaic law knows nothing of any appeal, in our modern sense, from the judgment of a competent tribunal once possessed of the cause. It does take notice, more or less, of want of competence in the jurisdiction or procedure, and of wilful denial of right, and of inability to do right by reason of external hindrances, of which the chief is the overbearing power of great men strong enough to defy the court. If the king is called in, it is to break down a resistance hardly distinguishable from incipient rebellion; and indeed the name of the writ of rebellion carries on this point of view into the settled and peaceful practice of courts of equity (themselves a later development of extraordinary royal power) down to a time within living memory. We must think not of the everyday executive process of the sheriff's officer, but of a requisition for Federal troops, if we would realize the medieval beginnings of the king's justice. It was a special and higher justice, not conceived, at first, as meant for common occasions or common persons.

This kind of interference might well be expected to become, with the increasing strength of the monarchy, frequent, and from being frequent to become systematic. But it does not appear obvious why rule and order thus brought in from above should have any continuity with earlier

traditions. It would not have been hard, one would think, to seek elsewhere for guiding principles. We are apt to forget how modern is the compact insularity of Britain and British affairs. John had lost Normandy and Edward failed to win Scotland, but England under the first Edward after the Conquest was a Continental power of no mean rank. On the Continent Roman jurisprudence was in the pride of its revival; a new stream of foreign influence, more refined and more penetrating than the Norman, was making its way in England. There must have been much temptation for learned persons to regard any specially English ideas and usages as a kind of provincial heresy. Theologians, at any rate, could tell them of a British heresiarch. Or, if the matter was too stubborn, the attempt might have been made to force it into some mould of Romanist doctrine; Bracton did indeed make such an attempt on paper, though to a much less extent than has been supposed, and, I venture to think, neither expecting nor desiring much practical result. An imposing parade of learned reasons might have been mustered with ease in favour of innovation on a grand scale. Statecraft, scholarship, cosmopolitan liberality, were all ready to be enlisted. And yet Edward I built on the old foundations and built firm. The building lasted till our own day; the foundations are unmoved. Shall we not say that he was a bold as well as a wise man? Daring greatly to be insular, we stood aloof from the Pandects and the Lex Regia; we made Parliament and the Year Books, and our seeming barbarism is justified round the world.

Far be it from me to say that Edward I could really have done otherwise if he would. I believe in the divinity that shapes our ends. Rather the fact that our institutions were ordered as they were, and seemed to be so quite naturally, bears witness to the depth of national sense and tradition, a depth under a surface hardly ruffled by conscious effort. Probably no one, at the time, set himself to weigh reasons as in face of a large problem, or had any clear perception that he stood at a parting of the ways. We may think of reasons in detail, but they may be convincing only to a modern mind. Such a motive, for example, as jealousy of the Holy Roman Empire and its pos-

sible pretentions appears to lose much of its force when we remember not only that the Emperor was a long way off, and his ambitions looked beyond the Alps, but that an English king's son had been elected King of the Romans.[1] For my own part, I am inclined to give thanks for a quality in our national character which has perhaps never been fully accounted for. We prefer to call it practical wisdom; an impartial philosopher might put it in a neutral category of moral inertia, while a censorious critic might vilipend it negatively as want of imagination, or positively as a ballast of stupidity. Sometimes it is a gift rather than a defect not to see too far or too wide at once; it may save us from fighting against the gods. Not otherwise did we rise to the height of our destinies in India; not otherwise have these States added a large unwritten chapter to their Constitution, a chapter still exceeding hard for the wisest to read. Our bent is not to think of ourselves as setting an example to the world, or prescribing rules to our remote posterity, but to take up the day's work, be it more or less, and handle it as best we may. With us it is not "What memorable thing can we achieve?" but "How shall we get this business through?" No way, certainly, is exempt from temptations and besetting risks, and this has its own. It may lose us great opportunities, or blind us to impending trouble. Overmuch acquiescence in it leads to narrowness, to niggardly dealing with great interests, to lack of resource in great occasions, to mishaps, misunderstandings, friction, and waste. But on the whole it is less likely to end in crushing disaster than the far-reaching ambition which lays out new worlds for itself, and thinks to build them by forcing the hand of Providence. The founders of the common law worked faithfully for what they could see, and were rewarded beyond all reach of vision. We cannot say they were altogether of English race; it is at least doubtful whether some of them could speak English, and not doubtful that many of them did not habitually speak it; but they were thoroughly imbued with the national character, and though they might speak French and write Latin spoke and wrote as Englishmen.

[1] The general interest in Richard of Cornwall's election is well illustrated by Bracton's examples of conditions, which tempt one to guess that there was a good deal of betting on the event.

We have already renounced any claim to give a complete explanation. One way or another, it was judged or felt that the king's regular jurisdiction would be acceptable and stable only so far as it respected the spirit of popular justice. Indications were not wanting; the Grand Assize had been hailed as a master-stroke of reform, but the inventiveness of the king's clerks in framing new writs was checked as a grievance. I do not know whether there was a sort of general suspicion that the king's officers meddled too much, or the lords of private courts were afraid of losing profitable business. Few students of our legal history will think that the restrictive injunction of the Provisions of Oxford was wise, or that the partial relaxation effected by the Statute of Westminster was adequate. Parliament would not let the courts frame new writs and was incompetent to frame them itself, and "the Common Law was dammed and forced to flow in unnatural, artificial channels."[1] But our business here is to understand the strength of the root, not to justify the growth of all its branches. Thus the king's courts, at the outset of their career, came under a rule which we shall find to run through the whole of our legal history, and never to be neglected with impunity. It may be expressed thus: extraordinary jurisdiction succeeds only by becoming ordinary. By this we mean not only that the judgment and remedies which were once matter of grace have to become matter of common right, but that right must be done according to the fundamental ideas of English justice of which we spoke in the first lecture. The Court of Chancery conformed in good time, and prospered; the Court of Star Chamber, warped to political ends, resisted and perished, involving one or two harmless victims in its fall.

In one capacity, indeed, the king was already, from the Conquest onwards, a judge with ordinary and original jurisdiction. It is an elementary rule of feudal tenure that every lord is bound to do justice to his tenants. The tenant's duty of doing suit to the lord's court is correlative to the lord's duty of holding it. One may read of this, perhaps, better in Beaumanoir than in English books, but there is no doubt that the principle was accepted in Eng-

[1] Maitland, Bracton's Note Book, i. 7.

land as much as in Normandy or Aquitaine.[1] Now the king was the greatest of lords; confiscation, commendation, and the application of the theory of tenure to spiritual persons and houses of religion, had swelled a patrimony which was already considerable in the time of Edward the Confessor. The king's tenants naturally carried their disputes to him. In the Anglo-Norman period it is not always easy to see how far he is acting as judge, how far as a paternal arbitrator, and how far in the exercise of a supreme executive discretion. Sometimes we find him administering specific relief in ways not possible to a court with a fixed scheme of process and remedies.[2] None the less these exigencies produced, on the whole, a habit of acting judicially, which in the course of the twelfth century ripened into a definite procedure. Henry II seems to have enjoyed holding a formal court and discussing charters. The keener legal intellect of the thirteenth century could distinguish the king's seignorial justice from his public justice, as, on a greater scale, the framers of the *Statutum Walliae* distinguished with perfect accuracy between his feudal overlordship of Wales and the full political sovereignty acquired by conquest.

If the king was the greatest of lords, he was also the greatest of householders. From the earliest times he must have exercised a personal and domestic jurisdiction over his immediate attendants, not only menials and petty officials, but the whole body conveniently denoted by modern authors as the *comitatus*. Many of the king's companions were persons of high rank. Perhaps the king's dealings with his own household were more executive than judicial; and I do not know that any definite share in the establishment of organized royal justice can be attributed to this element. We can only say that it counts among the particular functions which go to swell the general volume of royal authority. At any rate the discipline of the king's retinue, enforced by the king's special peace, helped to make the sight and thought of the king as a dispenser of justice

[1] See F. W. Maitland, Introduction to Select Pleas in Manorial Courts. Seld. Soc. 1889; G. H. Blakesley in L. Q. R. v. 113; and the present writer in Harv. Law Rev. xii. 230.

[2] This is most conveniently seen in Mr. Bigelow's "Placita Anglo-Normannica."

familiar. Obviously the same process was taking place on a smaller scale in the courts of private lords. We might have been spared much display of learning and some insoluble questions if modern antiquaries had remembered that men, and especially great men, in the Middle Ages were capable of doing what suited them first and leaving their counselors to find reasons for it afterwards.

Simultaneously with the definite establishment of the superior courts, or nearly so, the king's domestic jurisdiction itself became specialized in the Court of the Marshalsea. This and its much later offspring the Palace Court—an offspring which passed for legitimate by courtesy rather than by common right—have a curious little modern history which it will be more convenient to mention at the end of this lecture.

It is not part of my design to recapitulate particulars of our judicial history which are well known and easily verified. Blackstone, who is generally to be trusted after the middle of the thirteenth century, would suffice for the main outlines; but I am the more dispensed from any vain repetition because the "diversity of courts," as our old books say, and the growth and vicissitudes of their several jurisdictions, are now concisely and excellently set forth in a volume published not long ago by a younger colleague, Mr. W. S. Holdsworth of Oxford. For the present purpose we need only to bear in mind the broad fact that in the course of the thirteenth century we find the king's judicial court separated from the king's general council for affairs of state, and further divided into three branches of King's Bench, Common Pleas or Common Bench,[1] and Exchequer. If we are to fix a point where the royal jurisdiction becomes ordinary and of common right, it would seem to be given by the issue of writs in set forms to any one of the king's subjects who will pay the proper fee. The suitor who "purchases" a writ, as the official phrase ran, must of course choose at his peril that writ which will avail him in his particular case. It is no business of the court or its

[1] The "certain place" of Magna Carta did not imply a permanent fixing at one place, but only that the Common Pleas were not to follow the then constant journeyings of the king. The final settlement at Westminster came later by convenience and usage. See Holdsworth, Hist. Eng. Law i.75.

officers to see that he gets the right one. That is part of the fundamental methods of the common law; the party can have the law's help only by helping himself first. On these terms, and not otherwise, it is open to all. But if we must have a date to remember, we still cannot find a better than that of Magna Carta, for the text of the charter shows clearly that the king's justice is no longer a matter of favour, and that not even any verbal fiction of its being so will be admitted.

The courts were there, but more was to come. It was not enough, in the almost roadless England of Henry III's and Edward I's reigns, that men should be free to come to the king's own personal court which followed him, or to the king's judges who did not follow him but sat in a certain place. Royal justice, if it was to prevail thoroughly had to go forth and conquer the ancient and less convenient jurisdictions on their own ground. Here again an extraordinary and occasional but recognized procedure was available for transformation into a regular and ordinary system of justice, brought, comparatively speaking, to the suitor's own door, but intimately connected with the central authority. The justices in eyre and their successors the justices of assizes did more than carry the advantages of the superior jurisdiction[1] into every part of England. They saved us from a multiplicity of coördinate and independent tribunals which would scarcely have been strong enough to hold their ground at the end of the thirteenth century, and surely would have been too weak to hold it in the middle of the sixteenth, against a wholesale reception of Romanized learning. It was an ancient function of the king, whether regarded as privilege or as public duty, to supervise the administration of justice either by journeys in person[2] or by the visits of commissioners. We have an

[1] It is one of our historical curiosities that the technically superior position of a judge of assize was solemnly determined only after the middle of the nineteenth century, and then, one may say, *in corpore vili*. The judgment delivered on that occasion by the late Mr. Justice Willes (*In re Fernandez* (1861) 10 C. B. N. S. 1) is still a classical authority on the whole subject. That most learned and admirable judge directed me to it himself when I was his marshal on the Western Circuit more than thirty years ago.

[2] Maine, Early Law and Custom, 179.

account of Alfred's activity in this kind, unhappily much confused by the pseudo-classical ambition of Asser's style, perhaps also by a Welshman's imperfect acquaintance with the customs of Wessex. After the Conquest we find a steady increase of royal missions for various purposes. The Domesday inquest is memorable among these. It is true that it only touches the fringe of any judicial business. King William's clerks were concerned with his revenue first, and with questions of tenure and title merely as incidental to the determination of the accountable estates and persons. Still we may fairly reckon this as a first step. A century later the itinerant justices, organized experimentally but still organized by Henry II, are distinctly judicial officers, but revenue has not ceased to be their care: "The itinerant judge of the twelfth century has much of the commissioner of taxes."[1] It is significant that we find a writ of Henry III, to all appearance defining and improving a practice already known, which commands the county court to meet and assist the justices in eyre.[2] The functions of the county court on these occasions appear to have been of a strictly subordinate and ministerial kind, and not judicial at all; it was answerable for the proper business being laid before the royal commissioners. So far the commissions of itinerant justices might be wider or narrower; they might cover a comprehensive visitation or be limited to the hearing and determining of a single cause. But the Crown's undertaking in Magna Carta, to send out justices regularly to take assizes—the possessory actions introduced by the king's remedial justice—caused one variety of itinerant jurisdiction to become fixed and ordinary, though the promise was fulfilled in but a half-hearted fashion before the time of Edward I. The Statute of Westminster added to these judges the miscellaneous civil jurisdiction which we still call *nisi prius*, and finally they acquired, with the aid of various other statutes, and under a number of seemingly unconnected authorities, the power of doing complete justice both civil and criminal somewhat as the early Roman emperors were, in theory, only citizens on whom the Senate and the People had been

[1] Maitland, P. C. for Gloucester, xxvi. [2] Stubbs, S. C. 358.

pleased to accumulate the functions of several offices.[1] Once consolidated by usage, their circuits became as much a constant part of the judicial system as the sittings of the courts at Westminster; and the old justices in eyre silently disappeared, their work being superseded or supplanted in all its branches. There was no longer an extraordinary delegation of royal power, but an ordinary legal tribunal; and it was understood that the powers with which the judges, at Westminster or on circuit, had been invested could not be varied by the king's sole authority. The judgment must be the judgment of the court, for "the king hath committed and distributed all his whole power of judicature to several Courts of Justice."

Much of the king's power had gone out of him by the establishment of the courts at Westminster. But no one supposed in the days of Edward I, or long afterwards, that the king's residuary jurisdiction, to use Maine's convenient term, was exhausted. We need not decide whether Henry II's reservation to himself and the wise men of the kingdom of cases too hard for his judges[2] was intended to cover original applications, or (as I rather think) only to provide for rehearing of matters referred by the judges. Express reservation of the power which no one doubted was made, if it was made, only as an abundant caution. With or without special ordinance, the king and his Council were still there, and might still be called on to do extraordinary justice when the law was insufficient, or in the case, by no means infrequent, of the law having spoken, but execution of its judgment being impracticable by ordinary means. Apparently the doctrine commonly held down to the seventeenth century was that a "pre-eminent and

[1] Blackst. iii 60; G. J. Turner, "Circuits and Assizes" in Encycl. Laws of England, vol. 3. To this day the commissions are issued substantially in the old forms, but "since 1884 the names of all the judges of the Supreme Court of Judicature have been placed in the various commissions." Coke's concluding observations in the chapter on Justices of Assize and Nisi Prius in his Fourth Institute are still profitable: "It is commonly called a writ of Nisi Prius, but the words of the writ are Si Prius, etc. And albeit the authority of Justices of Assize . . . . hath by Act of Parliament been exceedingly enlarged both in dignity and magnitude of causes, yet they retain their first and original name, albeit Assizes are in these days" (temp. Jac. I) "very rarely taken before them."

[2] Stubbs, Const. Hist. I. c. xviii, § 163.

royal jurisdiction" remained for the benefit of the subject, and to refuse the exercise of it to "the injuriously afflicted" would be a denial of justice. It was admitted, however, that when "courts of ordinary resort" had once been set up, it was beyond the king's power to alter their jurisdiction, or administer any kind of justice actually contradictory to the rules followed by them. The greatest and most successful exercise of the king's residuary authority in this behalf was the formation of the Court of Chancery, described by William Lombard, an Elizabethan legal antiquary of considerable repute though not a writer of authority, in these terms: "The king did commit to his Chancellor (together with the charge of the great seal) his own regal, absolute, and extraordinary pre-eminence of jurisdiction in civil causes, as well for amendment as for supply of the Common Law."[1] There was, of course, no such delegation of authority by any single act of institution. It would be rash to say that there was much deliberate policy about the gradual separation of judicial relief in matters of grace from the general administrative work of the king's Council. Undoubtedly, "the Chancellor's jurisdiction is an offshoot from that of the Council," that is, the king exercising his so-called pre-eminent jurisdiction with the advice of his Council, a jurisdiction of which the scope was for a long time very loosely defined. It does not appear that the Chancellor had any individual judicial functions, otherwise than as one of the Council, much before the middle of the fourteenth century, though there may have been a stage of transition during which the business was done by the Chancellor but a few other members of the Council were present for form's sake. The Chancellor certainly acquired power to sit alone, or had it confirmed, in 1349; but this did not forthwith exclude the older practice. Cases of what we should now call equitable jurisdiction continued to be taken to the Council till the latter part of the fifteenth century; as, on the other hand, many cases were brought before the Chancellor by bill of complaint which, according to modern practice, would have been dismissed for "want of equity," the plaintiff having, on his

[1] In his "Archeion" (*sic*) of which the dedication to Sir R. Cecil is dated Oct. 1591.

own showing, a cause of action at common law, and the only reason for seeking extraordinary relief being the plaintiff's poverty, or the defendant's overbearing influence and "horrible maintenance." A suit for failure to deliver goods, supported merely by a suggestion that the plaintiff is "but a poor man and fearful of sufficient remedy" is perhaps the strongest case recorded.[1] Indeed we scarcely hear of Equity by name in the early history of the Court. In the twelfth century the writer whom we call Glanvill could speak of the king as wielding the rod of equity to dispense justice to the lowly and meek, but this is a mere vague flourish. In the fourteenth and fifteenth centuries Conscience, and sometimes Reason, were more commonly invoked; the use of the word Reason suggests a connexion, which this is not the place to follow, with the scholastic and cosmopolitan doctrine of the Law of Nature, and, strange as it may seem to lawyers who know the developed Chancery procedure, or laymen who have read of its delays in fiction pretty well justified by fact, the court was regarded as the refuge of the poor and afflicted. To be "Protector of the Poor" has ever been a royal attribute; the quasi-paternal power over lunatics and infants, which still exists in a modified form and is administered through the regular machinery of the court, is akin to it. In India this attribute has sunk to an empty honorific title addressed indiscriminately to all superiors; any European gentleman, even an unofficial traveller, may be saluted as *Gharib-parwar* a dozen times in a day. In medieval England it was still real enough to assist in founding a jurisdiction. The court was also "the altar and sanctuary for such as against the might of rich men, and the countenance of great men, cannot maintain the goodness of their cause."[2] So long as these were the supposed reasons for his judicial existence, the Chancellor was naturally prone to magnify his office by surrounding it with a sort of moral halo, while he avoided anything like a legal definition of what he could or would do; and traces of this tendency may be found in the language of writers on equity, and of the court itself, long after

[1] Cal. Proc. Ch. i. xx.

[2] Holdsworth 206, citing a tract ascribed (it seems without warrant) to Lord Ellesmere, but at any rate of his time.

the system had become as technical as that of the common law courts. Obviously, too, the residual jurisdiction of the Crown, of which the Chancery was a branch, would be the more imposing if it remained undefined. But this consideration cut both ways. Defeated suitors felt, not that they had played their game according to rule and lost, but that they had been sacrificed to an inscrutable decree of the king's conscience (represented by the Chancellor, whose conscience might be no better than another man's) setting itself above the law. The king's justice, even as the moderator of legal rigour and champion of good conscience, could not remain extraordinary if it was to be stable. Not only suitors but rival practitioners were eager to trip it up; the common lawyers complained that its decrees were dependent on "the conscience and discretion of the hearers thereof," and that they decided either according to the Civil Law, which had no authority in this realm, or to their own conscience. The only way left was for equity to become a special kind of law and not a discretion capable of subverting law.

In fact, it was settled beyond doubt in 1614 that, as the king had finally delegated his common law jurisdiction to the Courts at Westminster, and for certain limited purposes to the Chancellor, so he had finally delegated his jurisdiction to do Equity to the Court of Chancery. "The King cannot grant a commission to determine any matter of equity, but it ought to be determined in the Court of Chancery, which hath had jurisdiction in such case time out of mind." So, we are told, Lord Ellesmere resolved, assisted by Coke, then lately translated from the Common Pleas to the King's Bench, two puisne justices and the Master of the Rolls; and it had already been held in Elizabeth's time that the queen could not set up a new court of equity by letters patent.[1] Meanwhile a fierce and vexatious conflict had been raging for many years between the Chancellor, endeavoring to do complete justice, and the judges of the common-law courts, who regarded him as an arbitrary intruder putting his "sickle in another man's

[1] Coke, 4 Inst. 87, 213; the report in 12 Rep. 114 (a book of inferior authority, as is well known) may be accepted with this corroboration, and I use its words.

crop," as Bracton would have said. The story has been lately retold by an accomplished American lawyer, though not for a strictly professional purpose. Judge Phelps of Baltimore has made a most ingenious use of it to clear up Falstaff's remark—at first sight pointless to the modern reader—about "no equity stirring."[1] What concerns us now is the ground taken by the law officers of James I, in the spring of 1616, when they were required to advise whether the Statute of Præmunire restrained the Court of Chancery from giving equitable relief against a judgment "lawful and good by the rigour and strict rules of the common law." In an opinion presumably drafted by Bacon, then Attorney-General, they declared, amongst other points, that "the Chancery is a court of ordinary justice for matter of equity, and the statute meant only to restrain extraordinary commissions, and such like proceedings."[2] The king's decree made upon this opinion—a personal act of prerogative—upheld the jurisdiction of the Chancellor. There were attempts to dispute it afterwards, but they were feeble and quite ineffectual.[3]

Undoubtedly the king would not have commanded Lord Ellesmere to send a case to the law officers unless both Lord Ellesmere and himself had known what the opinion would be; we may safely assume, too, that the opinion was framed in a manner intended to be pleasing to James I, and perhaps to some extent on lines of his own suggestion. Our result, then, is that both king and Chancellor found the surest way of maintaining the equitable jurisdiction was to lay down that the Chancery was a regular and ordinary court of justice. Bacon, probably, was not sorry to turn against Coke the declaration in which he had concurred with Lord Ellesmere only two years before. However that may be, the fixity and regularity of the jurisdiction were established, and within about a generation received conclusive professional recognition in the publication of reported decisions, though it must be confessed that the early Chancery reports are of

[1] Falstaff and Equity, by Charles E. Phelps, Boston and New York: 1901. See L. Q. R. xvii. 322.

[2] Bacon, Letters and Life, ed. Spedding, V. 389, 393.

[3] Holdsworth, 250.

no great merit. After this it was only a matter of time for Bacon's successors to put the House of Equity in order, and make her, as Wallace says, "the intelligent companion instead of the arbitrary mistress of the common law." Modern equity was certainly in its infancy in Blackstone's time; still Blackstone could say truly that "the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents from which they do not depart."[1] The genius of our law deliberately prefers the risk of some hardship in particular cases to the unlimited dangers of arbitrary discretion; and in this general principle, as well in various and more specific matters, equity follows the law. So completely has it forgotten its old claim to administer natural justice that a judge of the Chancery Division in England can now say, "This Court is not a Court of Conscience."[2]

Thus did the Chancellor's equitable jurisdiction become, and declare itself to be, regular and ordinary, as a condition of being acquiesced in by the other courts and accepted by the Commonwealth. But this was not all. The Chancery had to make large concessions to the common law in its procedure. That procedure was founded on the summary process of the canon law (not directly on the civil law), and was originally inquisitorial. Perhaps the most striking deviation of a suit in equity from a typical action at common law is the power of the court to examine the parties on oath, a power absolutely unlike anything at the disposal of the King's Bench or the Common Pleas. This, like all the rest of the proceedings from first to last, was, in theory, under the direction and control of the court, which might and sometimes did take evidence on its own account "to inform the conscience of the judge."[3] But we find that these functions of the court were already handed over to the parties when equity procedure became settled, and the procedure, though differing much in form

[1] Comm. iii. 432, c f. Williams, R. P. 19th ed. 163. [2] [1903] 2 Ch. 195.

[3] Spence i. 380, calling this "a strange practice," which it is from the English but not from the Continental point of view. The practice of taking evidence in writing, though widespread in modern Romanist systems, is no necessary part of the civilian or canonical scheme: Langdell, Equity Pleading, sec. 8.

from that of the common law courts, was in substance no less contentious. The Chancellors had resisted all attempts to introduce the rules of common law pleading, but no one who has made acquaintance with equity pleadings even in their latest reformed shape can charge them with having failed to stiffen themselves with sufficient technical rules of their own. What concerns us here, however, is that the judge's authority to inform himself became the litigant's right to obtain discovery from his adversary. Much of the work of modern courts of equity, as all lawyers know, is not litigious at all, but administrative, though it may involve decision between conflicting claims, and thus lead to the settlement of disputed points of law. But even this was not distinguished in form from the ordinary contentious jurisdiction. It may be doubted whether the operation of the court in administering estates did not suffer in both speed and efficiency from this refusal or failure to discriminate between really different functions. The facts, at any rate, show the strength of the Germanic tradition which insists on regarding the court as an umpire between parties.

Meanwhile the "preëminent" or supra-legal jurisdiction of the king in Council survived for a considerable time. It took another specialized form in the Court of Requests, originally a poor man's court of equity. This court passed through a sharp conflict with the judges of the common law, to whom it was unable to oppose the justification of ancient origin. They could not deny that it was useful, and Coke himself suggested statutory regulation. After a short time of revived activity in the reign of Charles I the court perished in the general ruin of the Privy Council's extraordinary jurisdictions, and no attempt was made to set it up again at the Restoration. It seems to have been a pure misadventure that it failed to develop into a regular court of equity, whose relations to the Court of Chancery might have been adjusted later without much trouble, and with no small benefit for suitors. A modern Master of the Requests would have been in name a dignified and fitting companion to the Master of the Rolls, and in fact quite as useful as the Vice-Chancellor who had to be invented much later. For our purpose the moral is that irregular courts,

in the lands of the common law, are not tolerated in the long run even when they are innocent. The vicissitudes and downfall of the Star Chamber and other branches of the jurisdiction exercised by the King in Council will be better considered under the head of the relations of the common law to criminal justice and executive power.

One court might claim, down to modern times, to represent the king's original personal justice more directly than the superior courts of common law and even the Chancellor. This was the Marshalsea, the special court of the king's household wielding archaic and limited jurisdiction over its members; it does not seem to have had anything to do with the King's Council. Its more obvious defects of jurisdiction were supplemented by a new court, entitled "The Court of the Lord the King, at the Palace of the King at Westminster," created by several letters patent of James I, Charles I, and finally Charles II. These courts appear to have almost escaped professional criticism, partly because their jurisdiction was merely local, partly because their powers followed substantially the course of the common law. At any rate the final charter of Charles II was not disputed; and the Marshalsea, moreover, rested on the firm ground of prescription. We learn, however, from the only writer on the practice of these courts, that the Palace Court had quite superseded it by the beginning of the 19th century at latest; the two courts purported to be opened together, but the Marshalsea did no business. He that would know the true causes of the fall of the Palace Court may find them set down as well in a very useful modern book of reference[1] as by a layman whose name was Thackeray in the Ballads of Policeman X, under the heading of "Jacob Homnium's Hoss: a Pallice Court chaunt." Like most petty local courts the Palace Court became a hotbed of abuses and, although error would lie to the King's Bench, the remedy of a new trial was not available to correct a perverse verdict. Such verdicts were not uncommon, for the juries were apparently drawn from the small tradesmen class, and invariably found for a tradesman plaintiff whatever the evidence and the law might be. The court was abolished in 1849, and there-

[1] Enc. Laws of Eng. *s. v.* Palace Court.

with, it would seem, the last relic of the only royal jurisdiction which had never passed through the hands of the Council.

Long before the accession of James I the king's justice had, as we have seen, become regular and had been delegated to his judges. If James I had been as prudent as his English ancestors, he would have tacitly accepted the fact that the delegation was irrevocable. But James I had theories of royal power in general and his own royal wisdom in particular; and he willingly gave ear when, being jealous of the common-law courts and their prohibitions, Archbishop Bancroft encouraged him to claim the right of taking an active part in judicial proceedings.[1] The view suggested was "that the judges are but the delegates of the King, and that the King may take what causes he shall please to determine from the determination of the judges, and may determine them himself." This drew from the judges, speaking by Coke, a solemn declaration "that the King in his own person cannot adjudge any case," but all causes, whether criminal or civil, "ought to be determined and adjudged in some court of justice, according to the law and custom of England." The king may sit in the King's Bench if he likes, but the court gives the judgment. Perhaps it is not commonly known that an empty seat is to this day reserved for the king at the Council Board at Whitehall; if it were his pleasure to occupy it during a sitting of the Judicial Committee, he would be as merely a spectator—though a specially honored one—as any stranger present. Thus we owe the positive definition of what might well have been left as a "constitutional understanding" partly to James I and partly to a not very wise archbishop; "it was greatly marvelled that the Archbishop durst inform the King that such absolute power and authority, as is aforesaid, belonged to the King by the word of God."[2] Still less could the king act in person in the executive part of justice, as the judges triumphantly showed James I in the Year Book of Henry VII. The reason is highly characteristic of the common law. "Hussey, Chief Justice, said that Sir John

[1] The introductory statement in Coke's Reports is neither full nor clear. For the connected story see Gardiner, Hist. Eng. ii. 38.

[2] 12 Co. Rep. 63-65.

Markham (Chief Justice of the King's Bench) said to King Edward IV that he could not arrest a man on suspicion of treason or felony as any of his subjects could, because if he did wrong the party could not have an action."[1] Here it is assumed without remark that any person, official or not, acting under the king's orders would be amenable to the ordinary process of law if his action were not justified. If the king's officer could not be liable to an action, but only to some form of discipline outside the ordinary jurisdiction, or indeed if such a position could be thought arguable, Markham's saying would obviously have no point at all. Even the servants of the king and the law must take the risk of being wrong; and since the king may not risk anything, he also must not play the game. A rather nice question might arise if a felony were actually committed in the king's presence and there were no one else to arrest the felon; but this is not known to have ever occurred. As for the good archbishop's conception of judicial authority, it was essentially civilian. It would have made the king the real judge and the judges his clerks. The relation which Bancroft fondly imagined to exist between James I and Coke is that which really does exist in equity practice between the judge and the Master or Chief Clerk,[2] where there is, properly, not an appeal from the Master's certificate, but a rehearing before the judge in person.

As judicature belongs exclusively to the judges, so does the interpretation of the law. This has never been disputed. We cannot positively say that Bracton held our modern doctrine as to the authority of judicial decisions; but we can safely say with Mr. Maitland, since Mr. Maitland has given us Bracton's note-book, that his law is case law. Early in the fourteenth century it was recognized in court that the decisions of the court would be used as authority; a century and a half later the judges were discussing, almost as we might now, what special circumstances would justify them in departing from a previous decision in point. As to the construction of Acts of Par-

[1] 1 H. VII, 4, pl. 5. Hussey is the modern form of this Chief Justice's family name; it appears that in his time it was written Huse.

[2] This official title was in use for many years in England, but is now abolished.

liament, the judges easily took up a commanding position. Who should know best what a statute meant, if not the judges who had themselves been consulted in framing it? "We know it better than you, for it was our work," said Hengham, C. J., to counsel discussing the Statute of Westminster.[1] Modern judges are more apt to protest that modern statutes have been made by incompetent workmen, or, as oftener happens, marred by incompetent amenders before they finally passed. So complete is the detachment of the judicial from the legislative function that noble and learned members of the House of Lords have severely censured, in the exercise of the former, the language of an Act for which they were themselves answerable in the latter capacity. This, it will be observed, is, in the mother-country at any rate, purely the effect of professional custom. It has nothing to do with any enactment or modern constitutional rule; it is the completed outcome of our very ancient Germanic principle that the court finds its own law.

A great and novel development of this principle has taken place in the jurisprudence of the United States. It is mainly due to the commanding genius of John Marshall. The best and shortest expression of it I have found is in the words of the late Mr. Phelps, a true scholar, a brilliant lawyer and a profound statesman.[2] "It is upon the intrusting to the judicial department of the whole subject of the constitutional law, for all purposes, that our government rests," and, "that point once established by the court, the simple, the ancient, the salutary, the perfectly intelligible and just principles of the common law became sufficient for all the purposes of constitutional construction." The venerable traditions and the living vigour of our law are combined in the highest degree by the judicial authority of the Supreme Court interpreting the Constitution of the United States as the supreme law of the land.

FREDERICK POLLOCK.

[1] References in Pollock, First Book of Jurisprudence, 301, 302, 331.

[2] Orations and Essays of Edward John Phelps, New York and London, 1901, pp. 41, 42.